No. 95-2054

Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

In The Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS;
DONALD ALTHOFF, Mayor of the City of Lake Angelus;
MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BEIER HOWLETT, P.C.
James L. Howlett
Counsel of Record
John D. Staran
200 East Long Lake Road,
Suite 110
Bloomfield Hills, MI
48304-2361
(810) 645-9400

Reardon-Parshall Co. 550 W. Fort St. Detroit MI 48226 (313) 962-0744

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in ruling that the Federal Aviation Act does not preempt the provisions of City of Lake Angelus ordinances 25(J) and 66(E) which prohibit seaplanes from landing or operating on the surface of Lake Angelus.

II.

Whether the Court of Appeals erred in ruling that City of Lake Angelus ordinances 25(J) and 66(E) satisfied the applicable legal test for validity by having a rational relationship to legitimate police power and land use concerns.

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I.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Gustafson is seeking a declaratory judgment invalidating provisions of the nuisance and zoning ordinances of the Respondent City of Lake Angelus which prohibit seaplanes from using the surface of Lake Angelus.

The City of Lake Angelus is Michigan's smallest city by population (328 per 1990 census). It is entirely a residential community, consisting of approximately 140 homes fronting on Lake Angelus, a small inland lake having no public access and lying entirely within the City. The principal function of the city government is to preserve the unique residential character, natural beauty, tranquillity and environmental quality of the community. Seaplanes have been prohibited by ordinance for many years and this prohibition has been strongly supported, respected and observed by the community and is viewed as a matter of substantial importance in preserving the essential character and quality of the City. No one has ever been arrested or prosecuted for violating the seaplane ordinances.

Petitioner Gustafson resides in a home on Lake Angelus, and desires to acquire a seaplane which could be moored in front of his home and flown to and from the lake for recreational purposes. He does not presently own a seaplane. Compliance with the ordinances would not restrict him from any established activity; it merely prevents him from undertaking a new recreational activity which is not permitted under the local ordinances.

Ordinance 25 is an amendment to the City's nuisance ordinance, and section 3 J thereof declares the following to be a public nuisance (Pet. App. 38a):

> The landing upon the lands, waters, or ice surface within the City of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft.

Ordinance 66 is an amendment to the City's zoning ordinance, which includes prohibitions against various land uses. Subsection 4.10 J thereof prohibits the following (Pet. App. 38a):

> The mooring, docking, launching, storage or use of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft.

When the suit was filed, both ordinances also prohibited "the flying of any such craft in the airspace above the City of Lake Angelus at an altitude of less than five hundred feet." That provision was subsequently deleted from both ordinances by amendment and is not at issue. The City never attempted to enforce the altitude limitation against Petitioner or anyone else and there is no actual controversy regarding it.

The factual basis of Petitioner's case arose from a single incident occurring on August 9, 1991, when Petitioner landed a rented seaplane on Lake Angelus in violation of the ordinances. He was not arrested or prosecuted, but a police officer contacted him at home later in the day and informed him that the landing violated city ordinances. Petitioner promptly requested that the City Council change the ordinances to permit seaplane landings. On September 10, 1991, the Lake Angelus City Council gave consideration to Petitioner's request, but denied the request and reaffirmed by resolution that the intended purpose of the ordinance was to protect the public health, safety and general welfare of persons and property within the City, and defined the public interests served as follows (Resp. App. 1a):

> . . . the City Council believes that the use of Lake Angelus in violation of the foregoing ordinance would be contrary to the public health, safety and welfare because of noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water, destruction of property values, interference with other lawful uses of the lake enjoyed by the great majority of citizens including boating, sailing, fishing, swimming, and other recreational uses; and

> . . . the unique nature of the community and the value attributed to property located in the City of Lake Angelus are based and depend upon the continuation of long-standing restrictions against uses deemed offensive by the great majority of citizens.

Having failed to persuade the City Council to rescind or modify the ordinances which prohibit seaplane landings, Petitioner filed this suit in the United States District Court for the Eastern District of Michigan on July 13, 1992, seeking to invalidate the ordinances. He also claimed that the ordinances violated his civil rights and sought relief under 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

B. Proceedings in District Court

The issues were framed under Petitioner's First Amended Complaint dated January 12, 1993, and Respondents' Answer to First Amended Complaint. There were no significant factual disputes, and both parties recognized that the case could be resolved as a matter of law without the necessity of an evidentiary trial. Cross motions for summary judgment were filed. At the motion hearing on October 21, 1993 both parties acknowledged on the record that there were no material issues of fact and that the case could be decided on the legal issues (Pet. App. 39).

On October 22, 1993, the day after oral argument, the District Court issued its written decision. The Court ruled that the ordinances were valid under applicable state law standards, but that the regulation of seaplane landing sites was preempted by the Federal Aviation Act. An injunction against enforcing the ordinances was issued. Petitioner's civil rights claims under 42 USC § 1983 and 42 USC § 1988 were dismissed on the merits.

C. Proceedings in the Court of Appeals

The Lake Angelus Respondents appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner Gustafson filed a cross appeal regarding his civil rights claims.

The Court of Appeals reversed the District Court ruling on federal preemption, found that there was no preemption, and

ruled that the ordinances are valid and enforceable. Consistent with that ruling, the Court of Appeals affirmed the dismissal of the civil rights claims.

The Court of Appeals decision is noteworthy for the content of the three separate opinions which were written. Judge Leroy J. Contie wrote the principal opinion, setting forth a detailed analysis applying the facts of the case to the established law. Judge Nathaniel R. Jones wrote a concurring opinion, indicating that Judge Contie's opinion was "legally unassailable" but expressing his general support of a strong central government. Judge Alice M. Batchelder wrote a concurring opinion, primarily directed toward Judge Jones' comments, citing *The Federalist* No. 45, and expressing her concern over the usurpation of the rights of states by the federal government. It appears that the Court of Appeals decision is supported by scholarly legal analysis and by a spectrum of policy viewpoints.

Petitioner sought a rehearing by the Court of Appeals en banc, but no judge of the Sixth Circuit requested a vote on the suggestion for rehearing en banc. The petition for rehearing was referred to the original hearing panel which denied it.

II.

PETITIONER'S MISSTATEMENTS OF FACT AND LAW

A. Petitioner's Question II is Defective

Petitioner's statement of Question II is inaccurate, misleading and argumentative:

> Whether a discriminatory city ordinance violates a riparian property owner/airman's rights to due process and equal protection where the ordinance is exclusionary, prohibits a reasonable use of the water, is arbitrary, capricious and not reasonably related to a government interest? (Petition, p i)

As stated, the question suggests that the legal nature of the ordinance is accurately described, and that the issue is whether such an ordinance would violate due process and equal protection

rights. Actually, both the District Court and the Court of Appeals have ruled that the ordinances were not as described. It was decided by both lower courts that the ordinances were not discriminatory, were not exclusionary, were not arbitrary and capricious, and were reasonably related to a legitimate governmental interest. The Petition does not raise a question for certiorari regarding the lower court's legal characterization of the ordinances, but has improperly premised the question which it does raise on a contrary and inaccurate characterization of the ordinances. This misstatement violates Supreme Court Rule 14. 1. (a), which requires that questions not be argumentative. Under Supreme Court Rule 14. 4, the failure of Petitioner to present this question with accuracy and clarity is sufficient reason for the Court to deny certiorari regarding it.

B. Petitioner Misrepresented an Altitude Issue

Petitioner repeatedly misrepresented to the Court that there is an issue in this case over the former provision of the City ordinances which prohibited flights at altitudes below 500 feet (Petition, pp 1, 3, 5, 7, 8 and 23). There is no such issue.

Petitioner states, "...the city vehemently denied that even the airspace portion of its local ordinance was preempted, until the District Court ruled that the 500 foot prohibition is Federally Preempted (Petition, p 7)." This statement is false and misleading. The District Court opinion correctly states the City's position as follows:

> Defendants ask the court to bifurcate the ordinances, separately considering the altitude restriction and the restriction on seaplane operations on the surface of the lake... Defendants seem willing to give up the altitude restriction, but not the landing portion. (Pet. App. 47)

Judge Contie's footnote on this subject, in the Court of Appeals decision, is precisely accurate:

> When the suit was filed, ordinance 66 included an altitude regulation which prohibited flying over the City at altitudes less than 500 feet. Although the altitude regulation had never been enforced against

> plaintiff or anyone else, plaintiff Gustafson also challenged its validity. The City acknowledged that this provision was federally preempted and did not argue in support of its validity. **The altitude regulation** was subsequently deleted from ordinance 66 by amendment and **is not at issue in this appeal**. (Pet. App. 3, emphasis provided.)

Petitioner's reason for raising this nonissue, and misrepresenting the City's position regarding it, appears to be to obscure the distinction between land use regulations which are not preempted and airspace regulations which are preempted. This strategy does not justify the Petitioner's misrepresentation. Instead, it subjects the petition to denial under United States Supreme Court Rule 14.4.

C. Petitioner Improperly Filed an *Amicus* Brief

Both parties were supported in the Court of Appeals by *amici curiae*. Petitioner was supported by a brief filed by *Amicus Curiae* Seaplane Pilots Association. Respondents were supported by a brief filed by *Amici Curiae* National Institute of Municipal Law Officers and Michigan Municipal League. Petitioner has included his *amicus* brief as part of his appendix (Pet. App. 54 to 76).

The filing of an *amicus* brief is governed by Supreme Court Rule 37. The Seaplane Pilots Association has not undertaken to file a brief in compliance with that rule.

Supreme Court Rule 14.2 provides, "No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file a petition for a writ of certiorari to which any supporting brief is annexed or appended." The *amicus* brief is a separate brief filed by the Petitioner to support his position.

Although Supreme Court Rule 14.1 (i)(vi) liberally permits a petitioner to append "any other material the petitioner believes essential to understand the petition," that provision should not be interpreted to avoid the provisions of Supreme Court Rules 37 and 14.2 or to permit the filing of argumentative material in excess of the 30 page limitation under Supreme Court Rule 33. Respondents urge the Court to disregard the *amicus* brief filed by Petitioner.

Respondents have not appended the supporting brief of *amici curiae* National Institute of Municipal Law Officers and Michigan Municipal League to this Brief in Opposition. If the Court should determine that the filing of such a brief as part of an appendix is proper and that it will be reviewed by the Court, Respondents request the opportunity to file a copy of the *amici* brief in support of their position as a supplemental appendix.

III.

PETITIONER HAS NOT ADDRESSED OR SATISFIED THE STANDARDS OF RULE 10

Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for "compelling reasons." Rule 10 explains the character of reasons considered by the Court and states that a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Petition does not cite or address the Rule 10 standards, and its content fails to disclose the requisite compelling reasons to grant the Petition. Furthermore, the asserted errors consist solely of alleged misapplications of established rules of law.

The Petition does not involve conflicts among decisions or an important new federal question. Instead, it involves two well established rules of law: (1) the tests for validity of local ordinances; and (2) the doctrine of federal preemption. Petitioner is asking the Court to review the alleged misapplication of the facts of this case to these established rules of law. Under the standards of Rule 10, this is not a proper case for United States Supreme Court adjudication.

With regard to the validity issue, Petitioner's argument is that the ordinances were discriminatory, arbitrary, capricious, based on inadequate knowledge, and not reasonably related to a governmental interest. All of these arguments were fully considered, and rejected by the District Court and by the Court of Appeals. The validity issue does not warrant Supreme Court review.

With regard to the federal preemption issue, Petitioner's argument is that preemption of the regulation of navigable airspace under established law should be applied to preempt the Respondent's land use ordinances. There is an established body of law in this area, discussed by both the District Court and the Court of Appeals. Petitioner does not seek to change or clarify the principles of federal preemption, but merely to assert that they were misapplied by the Court of Appeals. In view of three concurring opinions from the Court of Appeals and the failure of any Sixth Circuit judge to request a vote on further en banc consideration, the preemption issue does not warrant Supreme Court review.

Petitioner has failed to show a compelling reason for this Court to grant the Petition under the standards set forth in Rule 10.

IV.

ARGUMENT

A. Summary of Argument

1. Ordinance Validity Issue. Under Michigan law, local regulation of lake uses is recognized as being valid under the police power and zoning authority the same as the regulation of land uses. Since Lake Angelus could prohibit airplane and helicopter landings on the land under established law, it can also prohibit seaplane landings on the lake under its police power and zoning authority. The test for validity is the existence of a rational relationship to the public health, safety and welfare, and there is a presumption of validity. The District Court and the Court of Appeals correctly determined that the ordinances in question were valid.

2. Federal Preemption Issue. Federal preemption is based upon congressional intent. The language of the Federal Aviation Act, its legislative history, and judicial precedent indicate a congressional intent to preempt the regulation of navigable airspace, and not to preempt the regulation of the surface of the earth. Courts have consistently ruled that the Federal Aviation

Act does not preempt local land use regulations, including the prohibition of aircraft and seaplane landings. The Court of Appeals correctly determined that the ordinances in question were not federally preempted.

B. Michigan Law Permits Municipalities to Regulate the Use of Lakes Within their Boundaries

In two recent Michigan cases, the Michigan Supreme Court has made it clear that the use of lakes is subject to municipal regulation under the police power and zoning power.

Square Lake Hills Condominium Association v Bloomfield Township, 437 Mich 310; 471 N.W.2d 321 (1991), ruled that townships may regulate boat usage on their inland lakes under their police power. A dissenting opinion indicated that such regulation is permitted as a land use limitation, but must be adopted under zoning ordinance procedures. Lake Angelus prohibits seaplanes under both its police power nuisance ordinance and its zoning ordinance.

In *Square Lake*, the Michigan Supreme Court affirmed the "rational relationship" test for determining the reasonableness of a police power ordinance:

> The reasonableness of an ordinance, while a question of law, depends upon the particular facts of each case.... The test for determining whether an ordinance is reasonable requires us to assess the existence of a rational relationship between the exercise of the police power and the public health, safety, morals, or general welfare in a particular manner in a particular case. *Square Lake*, p 318.

Applying that test to the facts before it, the court ruled as follows:

> ...Bloomfield Township determined that it was necessary to regulate boat usage in order to preserve and protect the health, safety and welfare of persons using and living near the inland lakes. The township found that lack of regulation resulted in a nuisance

> condition, and impairment of important and irreplaceable natural resources, the destruction of property values, and a threatening of the public health, safety, and welfare. Furthermore, the township recognized that if proper safety precautions were not immediately taken, the use of boats on inland lakes could be very dangerous to the persons and riparian property owners using the lake. In our view, Bloomfield Township took reasonable steps to alleviate future problems by recognizing this potential hazard. *Square Lake*, p 326.

The Michigan Supreme Court also cited the Michigan Constitution as authority in support of its decision upholding the ordinance:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.... Michigan Const 1963, Art 7, § 34. *Square Lake*, p 319, footnote 15.

The Resolution of the Lake Angelus City Council adopted September 10, 1991, (Resp. App. 1a), states the public purposes served by the seaplane prohibition, and satisfies the "reasonable relationship" test.

Hess v West Bloomfield Township, 439 Mich 550, 486 N.W.2d 628 (1992), addresses the subject of boat regulation based on the zoning power. In this case, the Michigan Supreme Court ruled that riparian rights to use adjacent waters are subject to regulation under the zoning power. In upholding the West Bloomfield ordinance which regulated docks and the launching and mooring of boats, the court stated:

> In order for townships to properly protect the bodies of water from destruction or impairment, pursuant to their zoning power ..., there must be an ability to regulate the exercise of riparian rights. To prohibit townships from exercising such regulatory zoning authority over riparian rights would permit the destruction or impairment of the natural resources associated with such bodies of water....

> This clearly could not have been the intention of the Legislature when it expanded the powers of townships to regulate land development and to promote the public health, safety, and welfare, pursuant to the zoning authority.... *Hess*, p 565

C. The Lake Angelus Ordinances Satisfy the Rational Relationship Test and Were Correctly Ruled to be Valid under Michigan Law

Ordinance 25 is a nuisance ordinance duly adopted pursuant to the police power granted to the City of Lake Angelus under its City Charter issued pursuant to Michigan's Home Rule Cities Act, M.C.L.A. 117.1, *et seq*; M.S.A. 5.2071, *et seq* (Resp. App. 28a). Ordinance 66 is a zoning ordinance duly adopted pursuant to the zoning power granted to the City of Lake Angelus under its City Charter and under Michigan's City and Village Zoning Act, M.C.L.A. 125.581, *et seq*.; M.S.A. 5.2931, *et seq* (Resp. App. 31a). As such, the ordinances are presumed to be reasonable and valid. *Kropf v Sterling Heights*, 391 Mich 139; 215 N.W.2d 179 (1974).

The provision quoted above from *Square Lake* indicates that the "rational relationship" test determines the validity of municipal ordinances which regulate the use of lakes. Ordinances 25 and 66 bear a rational, reasonable and substantial relationship to the protection and enhancement of the public health, safety and welfare and were enacted by the City of Lake Angelus after giving full and appropriate consideration to the rights of individuals and the public interest. The legislative purpose is clearly set forth in the Resolution of the Lake Angelus City Council adopted on September 10, 1991 (Resp. App. 1a). Aside from noise regulation, which may be preempted, the stated public purposes are all rational and reasonable. Actual and apprehended danger from aircraft landing and taking off from a small private lake used by boats and swimmers is certainly reasonable. The pollution, contamination and infestation of the lake are certainly reasonable concerns. In his deposition testimony (Resp. App. 5a) the Plaintiff acknowledged that he only recently became aware of zebra mussel infestation concerns, and has modified his own conduct as a result. Other pilots may still be unaware of the problem or

unwilling to take action required to avoid zebra mussel infestation by flying from contaminated lakes. The destruction of property values dependent in part upon the privacy and tranquillity of Lake Angelus are threatened, as are the uses of the lake by the great majority of citizens for boating, sailing, fishing, swimming and other recreational uses.

In his comments at the motion hearing in District Court, and in his written opinion, Judge Gadola correctly applied the rational relationship test to the facts of this case, as follows:

> The Court: For instance, regardless of the fact that you may feel that boats are a lot more dangerous than airplanes, and that may very well be, it seems to me that, absent the preemption doctrine, the — council . . . could adopt a regulation regarding airplanes on the basis that in the event of a malfunction, a boat isn't going to plunge into a neighborhood, you know, and — cause havoc and burn down houses and all that sort of thing, but a plane certainly can. (Transcript, p. 16; Resp. App. 8a.)

> The Court: Isn't there a legitimate state interest in . . . abating noise? Isn't there legitimate state interest in avoiding . . . the possibility of . . . a landing or taking off aircraft diving into an inhabited subdivision? (Transcript, pp. 28-29; Resp. App. 8a)

> The Court: . . . you demonstrate by your remarks the fact that . . . (safety concerns are) . . . a disputable point. That's a matter that seems to me is discretionary within the legitimate discretion of the municipality. (Transcript, p. 30; Resp. App. 7a).

> In addition, defendants have presented multiple rationales supporting the ordinances. The court finds that each of them is rationally related to a legitimate state interest. (Opinion, Pet. App. 49)

The Lake Angelus ordinances are within the delegated legislative authority of a Michigan municipality, satisfy the controlling rational

relationship test, are valid under applicable state law, and are enforceable unless their enforcement is federally preempted.

D. Federal Preemption Under Article VI of the Constitution is Based on Legislative Intent

The doctrine of federal preemption arises under the Constitution of the United States, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Wisconsin Public Intervenor v Mortier, 501 U.S. 597; 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) sets forth a lucid statement of the law of federal preemption:

> Under the Supremacy Clause ... state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." (Case cited.) The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent. (Case cited.) Congress' intent to supplant state authority in a particular field may be expressed in terms of the statute. (Case cited.) Absent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress ... touch(es) a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude statute authority. (Cases cited.) When considering preemption, "we start

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Case cited.)

Even when Congress has not chosen to occupy a particular field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," (case cited), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (case cited).

It is, finally, axiomatic that "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."

There is a three-way test under which federal preemption may occur: (1) Congress may expressly preempt a legislative subject matter; (2) Congress may impliedly preempt a legislative subject matter by occupying the subject so pervasively that there is no room for state and local legislation on the subject; or (3) preemption is implied if there is a direct conflict between federal and state legislation so that compliance with both is not possible.

Regardless of which of the three preemption tests is being applied, the goal is to identify the intent of Congress, and to determine whether or not Congress has expressly or impliedly undertaken to pass a federal law which preempts the legislative subject.

In this case, it is necessary to determine whether the Federal Aviation Act was intended to preempt the right of local government to prohibit seaplanes from landing in lakes within their boundaries

E. The Federal Aviation Act Was Not Intended to Preempt Local Land Use Regulations

Section 1508 of the original Federal Aviation Act set forth an express statement by Congress of the intended scope of its regulation:

> The United States of America is declared to possess and exercise complete and exclusive sovereignty in the **airspace** of the United States. (49 U.S.C. § 1508 (former), emphasis provided.)
>
> The 1994 amendment of the Act restated this declaration as follows:
>
> The United States Government has exclusive sovereignty of **airspace** of the United States. (49 U.S.C § 40103(a)(1) emphasis provided.)

Section 40103(b)(1) of the Act [former section 1348(a)] delegates to the Federal Aviation Administration the following implementation authority:

> (a) The Administrator of the Federal Aviation Authority shall develop plans and policy for the use of the **navigable airspace** and assign by regulation or order the use of the **airspace** necessary to ensure the safety of aircraft and the efficient use of **airspace**.... (49 U.S.C. § 40103(b)(1), emphasis provided.)

The statute asserts regulatory authority over the *airspace*, which is distinguishable from the *surface of the earth*. "Airspace" is not defined in the statute. The term "navigable airspace" is defined in the Act as follows:

> "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations... including airspace needed to ensure safety in the takeoff and landing of aircraft. (49 U.S.C. § 40102(a)(30))

Section 40103(b)(2) of the Act [former section 1348(b)] delegates to the Federal Aviation Administration the following implementation authority relating to the *regulation of flight, not landing rights:*

> The Administrator shall prescribe air traffic regulations on the **flight of aircraft** (including regulations on safe altitudes) for —
>
> (A) navigating, protecting, and identifying aircraft;
>
> (B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects. (49 U.S.C. § 40103(b)(2), emphasis provided.)

Petitioner argues that for purposes of this case, the preempted "airspace" includes the surface of Lake Angelus (Petition, p 22). This position is contrary to both common sense and established law on the meaning and interpretation of statutory language. "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." *Caminetti v United States,* 242 U.S. 470, 484, 61 L.Ed. 442, 452, 37 S.Ct. 192, 194 (1917). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v Dollar Park and Fly, Inc.,* 469 U.S. 189, 194, 105 S.Ct. 658, 661, 83 L.Ed.2d 582 (1985). "The term 'interest' is not specifically defined in the RICO statute. This silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' (citing case)" *Russello v United States,* 464 U.S. 16, 104 S.Ct. 296, 298, 78 L.Ed.2d 17 (1983). The preemptive regulation of airspace under the statute cannot reasonably be interpreted to include the regulation of the earth's surface, based on the language of the statute.

City of Burbank v Lockheed Air Terminal, 411 U.S. 624, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973) is the landmark decision on preemption under the Federal Aviation Act. In that case, the Supreme Court, by a five to four decision, ruled that the City of Burbank could not use municipal curfews to impose noise regulations on aircraft operations. Although the case ruled that the ordinance in question was preempted for special reasons, more importantly it recognized that many subjects relating to aircraft are not preempted.

For example, footnote 14 of the *Burbank* decision established the "proprietary exclusion" from preemption, which is the basis

for a line of cases ruling that municipalities could impose regulations, including noise regulations, if they were the proprietor of a municipal airport, which they might be preempted from imposing on nonproprietary facilities. *Alaska Airlines v City of Long Beach*, 951 F.2d 977 (9th Cir, 1991); *Greater Westchester Homeowners Association v City of Los Angelus*, 603 P.2d 1329 (1979), cert. denied 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980); *Santa Monica Airport Association v City of Santa Monica*, 659 F.2d 100 (9th Cir, 1981); *Global International Airways Corp v Port Authority of New York and New Jersey*, 727 F.2d 246 (2nd Cir, 1984). The extensive applicability to airports throughout the country of the proprietary exclusion from federal preemption, although not applicable to this case, makes it clear that the Federal Aviation Act does not preempt land use regulations applicable to aircraft.

The dissenting opinion in *Burbank*, written by Justice (now Chief Justice) Rehnquist, joined by Justices Stewart, White and Marshall, explored the legislative history and found extensive material indicating that *Congress did not intend to preempt local authority to regulate land use*, including the following:

> In dealing with this (noise) issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.
>
> Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill. (Senate Commerce Committee report quoted in Rehnquist dissent in *Burbank*)

Burbank is often cited as authority in a line of cases which recognize the right of local government to restrict, and prohibit, aircraft landings through land use and zoning regulations. *Faux-Burnhams v County Commissioners of Frederick County*, 674 F.Supp. 1172 (D.Md. 1987)("No federal law gives a citizen

the right to operate an airport free of local zoning control."); *Wright v County of Winnebago*, 391 N.E.2d 772 (1979)(FAA does not preempt local zoning); *Garden State Farms v Bay*, 77 N.J. 439; 390 A.2d 1177 (N.J., 1978)(heliport prohibited); *Wood v City of Huntsville*, 384 So.2d 1081, (Ala., 1980)(helipad prohibited); *Dallas/Fort Worth International Airport Board v City of Irving*, 854 S.W.2d 161 (Tex., 1993)(local zoning against airport construction and expansion not preempted-citing *Burbank* dissent; decision vacated following change in statute); *Ford City Bank and Trust Company v County of Kane*, 114 Ill. App. 3d 940; 449 N.E.2d 577 (Ill., 1983)(local regulation limiting number of aircraft permitted in restricted landing area valid); *Appeal of Green and White Copter, Inc.*, 25 Pa. Cmwlth. 445; 360 A.2d 283 (Pa., 1976)(prohibition of heliports under zoning ordinance valid); *Bluebell Associates v Township Engineer for Whitpain Township*, 45 Pa. Cmwlth. 599; 405 A.2d 1070 (Pa., 1979)(prohibition of airports under zoning ordinance valid).

In *Condor Corporation v City of St. Paul*, 912 F.2d 215, 219 (8th Cir, 1990), the Circuit Court of Appeals upheld municipal regulation of a heliport, rejecting a preemption argument and making the important distinction between airspace and land use regulation, as follows:

> "We see no conflict between a city's regulatory power over land use, and the federal regulation of airspace, and have found no case recognizing such a conflict. (citing *Wright* and *Garden State Farms.*)"

F. FAA Regulations Do Not Preempt Local Seaplane Prohibitions

The Regulations promulgated by the FAA do not expressly or by implication preempt the regulation of seaplane landing sites. The only reference to the use of lakes by seaplanes in the Federal Air Regulations is an operational regulation at 14 C.F.R. § 91.115:

> Right of way rules: Water operations. (a) General. Each person **operating** an aircraft on the water shall, insofar as possible, keep clear of all vessels and avoid impeding their navigation, and shall give way to any vessel or

> other aircraft that is given the right-of-way by any rule of this section." (14 C.F.R. 91.115, Pet. App. 14, emphasis supplied)

There is also an altitude regulation, applicable to all aircraft, which establishes different minimum altitudes for flights over land and over water (14 C.F.R. § 91.119(c), Pet. App. 104). There are no other Regulations even remotely applicable to seaplane landing rights. The FAA has not undertaken the comprehensive or even limited regulation of seaplane landing sites.

With regard to airport sites, which are defined in 14 C.F.R § 157.2 (Pet. App. 92) to include seaplane bases, the FAA has expressly deferred to state and local government. Although it issues advisory "determinations" on proposed airport sites, the Regulations provide:

> A determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts. (14 C.F.R. § 157.7(a), Pet. App. 99)

There is no statute or regulation which would satisfy the three way test for federal preemption of a local prohibition against seaplane landings. First, there is no express statement of preemption indicating that Congress or the FAA intended to authorize seaplane landings on all bodies of water and to preempt local regulation of the water surface. Second, there could be no implication of preemption based on total federal occupancy of the regulation of seaplane landing rights, since there are no regulations which even mention the right to land seaplanes. Third, there could be no implication of preemption arising from inherent conflict, since the regulations only relate to the safe operation of seaplanes, and not to their right to land at any particular location, and do not purport to grant landing rights.

The FAA itself has recognized that landings may be prohibited by local ordinance, since it has noted the Lake Angelus prohibition in its official publication. The United States Government Flight

Information Publication, *Airport/Facility Directory*, which purports to be "Published in accordance with specifications and agreements approved by the Federal Aviation Administration and the Department of Commerce" includes as part of the Airport Remarks relating to Oakland Pontiac Airport, the following (Resp. App. 13a).

> "Seaplane landings and takeoffs on Lake Angelus 4.5 miles ENE is prohibited by local ordinance."

Furthermore, it is beyond the scope of reason to consider that the very limited regulations relating to waters, and directed solely toward operational safety, and not to access rights, could be expanded in their legal effect to preempt an entire area of recognized state and local regulatory authority over the use of the surface of lands and waters.

G. Seaplanes are Regulated by State and Local Government Throughout the United States

The Petition suggests that the validation of the Lake Angelus ordinances would create a new and dangerous precedent under which state and local governments could interfere with the exclusive right of the Federal Aviation Authority to regulate seaplane landing sites. Actually, the converse is true. A decision in favor of the Petitioner would disrupt well established state and local seaplane regulations which exist throughout the country.

For example, the Wisconsin Statutes provide:

Local regulation of seaplanes (1) City, village and town ordinances. Any city, village or town adjoining or surrounding any waters may, after public hearing, by ordinance:. . .(b) Prescribe the areas which may be used as a landing and take-off strip for the aircraft or prohibit the use of the waters altogether. (Wis. Stat. @ 30.78, Resp. App. 15a)

The Vermont Statutes provide:

The landing of an aircraft on the lands or waters of another, without consent, or where there has been no airport, heliport,

restricted landing area or seaport established in accordance with the provisions of this title, is unlawful, except in the case of a forced landing. (5 V.S.A. @ 403, Resp. App. 17a)

The Pennsylvania Statutes provide:

The following represents rating categories to be used by the Bureau for issuance of an airport license:. . . (2) Private airport . . . (v) Seaplane. An area of water used as a landing area. (67 Pa. Code @ 471.5, Resp. App. 19a)

The Iowa Statutes provide:

It is unlawful for any aircraft to make use of the inland lakes of the state, except in the transportation of persons or property between points separated by a distance of thirty miles or more. (Iowa Code @ 462A.30, Resp. App. 22a)

The New Hampshire Aeronautics Act makes it unlawful:

For any person to operate or authorize the operation of aircraft for compensation or hire from any of the public inland waters or ice areas of the state unless such area is registered with the department. (New Hampshire RSA 422.1, Resp. App. 27a)

The Connecticut Statutes provide:

No person shall cause or permit an aircraft . . . to land upon, take off from or be operated, kept, parked, garaged, stored or otherwise maintained on any distribution or storage reservoir or on any watercourse tributary to any such reservoir. (CT ST s 25-43, Resp. App. 24a)

The foregoing are merely a sample of the pervasive and varying state and local regulations of seaplanes which exist throughout the United States. Although many other statutes could be cited, it is clear from the foregoing that the states, and not the federal government, are the actual regulators of seaplane landing sites.

H. Seaplane Prohibitions Have Been Held to be Valid by The Second Circuit, The Eleventh Circuit and State Courts in Texas, Louisiana, New York and Florida

Christianson v Hauptman, 991 F.2d 59 (2nd Cir., 1993), recognized the propriety of local decisions and the authority of land use agencies to prohibit seaplanes. Pursuant to the Fire

Island National Seashore Act, the National Park Service adopted rules in 1966 which prohibited seaplane landings. In 1979, at local request, the Park Service exempted Robbins Rest, a forty home residential community, from the regulation, thereby permitting seaplanes to land at Robbins Rest. In 1985, again at local request, the exemption for Robbins Rest was rescinded, thereby reestablishing the seaplane prohibition. A seaplane pilot brought suit against the National Park Service, asserting that its action was arbitrary and capricious. The Court of Appeals affirmed the District Court dismissal of the action, commenting, "Therefore, the decision to prevent seaplanes from landing and docking at Robbins Rest properly contributed to a reduction in noise and potential danger from the planes, thereby adding to the area's natural ambiance (p 63)."

Georgia Power Company v Baker, 830 F.2d 163 (11th Cir., 1987), upheld the right of a federally licensed power company to prohibit seaplanes from using its reservoir, even though its license issued by the Federal Energy Regulatory Commission required that it permit the use of the reservoir "for the purpose of full public utilization of such lands and water for navigation and for outdoor recreational purposes, including fishing and hunting." The Court noted that "Georgia Power's primary concern in prohibiting seaplanes was the safety of the public" and "(m)ore importantly, the company decided that seaplane operation on its reservoirs would present significant hazards both to the boating public and to seaplane pilots. Take-off and landing constitute a danger in themselves; and the exposed propeller of seaplanes poses an additional hazard to people on the lake as well as around docking facilities and boat ramps." Although the decision does not expressly discuss federal preemption, it states, "Accordingly, to the extent its rights are not inconsistent with federal law, Georgia Power has the authority to exclude adjacent landowners from the surface of the lake over its property." The Court ruled, "Georgia Power's prohibition of seaplanes on its reservoirs is a thoughtfully conceived policy and is a reasonable limitation on public access to its lake properties. As such, the ban is a proper application of Georgia Power's state law rights exercised in conformity with its federal license."

In two earlier state court cases, cited with approval by the Court of Appeals in this case, the courts upheld municipal ordinances which prohibited seaplane landings. In *City of Shreveport v Conrad*, 212 La. 737; 33 So.2d 503 (1947), the City of Shreveport prosecuted the defendant for low flying and landing a seaplane on Cross Lake in violation of a local ordinance. The defendant claimed that the ordinance was illegal, ultra vires and unconstitutional, and raised many of the arguments raised by Petitioner in this case: that aircraft did not pose a real or substantial threat to the purity of the water; that the ordinance was arbitrary and discriminatory because it did not also prohibit boats; and that the ordinance violated the equal protection and due process provisions of the constitution. The Louisiana Supreme Court rejected all of these arguments, ruled in favor of the City, and stated:

> The city has been granted sufficient police power to protect the health of its citizens from the pollution or contamination of its water supply and we are not prepared to say that the city abused its discretion in adopting the ordinance, or that it has no substantial relation to the pollution or contamination of the waters of the lake....
>
> The ordinance involved herein affects alike all persons similarly situated. In other words, it applies to all operators of planes. It is not arbitrary or discriminatory within the purview of the constitution. Due process of law and equal protection are had because the ordinance affects alike all persons similarly situated.

The present case is even stronger than the *Shreveport* case. Cross Lake is located outside of the municipal boundaries of Shreveport, but a state statute granted Shreveport limited authority to regulate the lake to prevent pollution and contamination and the court found the seaplane prohibition to be within that narrow regulatory power. Since Lake Angelus is located within the municipal boundaries, the City of Lake Angelus has a full spectrum of regulatory police powers and land use powers over the lake under Michigan law.

In *People v Altman*, 304 N.Y.S.2d 534; 61 Misc. 2d (1969), the defendant was prosecuted for landing a seaplane in Reynolds Channel, in the Town of Hempstead, in violation of a local ordinance. The defendant argued federal preemption under the Federal Aviation Act and unconstitutionality. The Court rejected the defendant's arguments and upheld the validity of the ordinance. In rejecting the preemption argument, the Court reviewed the law of federal preemption and stated:

> . . . local legislation will survive when its conflict with federal law is so indirect and not wholly repugnant to federal statute so that in the end the two are reconciled.

The *Altman* court also ruled that the ordinance was constitutional, noting:

> It is a familiar principle that there is a strong presumption of constitutionality attached to legislative enactments and those who seek to have them declared invalid must demonstrate their invalidity beyond a reasonable doubt. . . . Such presumption attaches as strongly to a municipal ordinance as to a state statute.

Helms v Diamond, 76 Misc. 2d 253; 349 N.Y.S.2d 917 (1973) involved the validity of a New York Environmental Conservation Department order which prohibited the landing of seaplanes on approximately 700 designated bodies of water. The plaintiff alleged that the order was invalid as to certain bodies of water which he had previously used in an air taxi business. The New York court upheld the seaplane prohibition, commenting, "However, it would seem, considering noise pollution alone, which should be as much the concern of the Legislature and its representatives as are other forms of pollution such as water and air pollution . . . , would justify regulations concerning the use of seaplanes . . . on State property."

In *Venetian Shores Home and Property Owners v Ruzakawski*, 336 So.2d 399 (1976), the Court of Appeals of Florida overruled an administrative order which authorized seaplane landings at a site which a hearing examiner had determined to be inadequate. The hearing examiner had determined that the proposed landing

site failed to satisfy the following standard under the Florida Administrative Code: "No seaplane base shall be approved which requires aircraft to operate in close proximity to a bridge, public beach, power line, boat dock or other area which could constitute a danger to persons or property." Despite the hearing examiner's finding the administrative agency granted a limited license authorizing the defendant to use his personally owned seaplane at the site. The Court held that the order was in violation of the applicable Florida statute and quashed it, thereby prohibiting all seaplanes at the site.

These six cases, all specifically relating to seaplane prohibitions and directly in point, provide authority for the rejection of all of Petitioner's arguments. *There are no reported cases in which seaplane prohibitions have been ruled to be unconstitutional or federally preempted.*

I. Public Policy Favors Local Regulation of Lake Uses

The right of state and local government to regulate the uses of land within their jurisdictions is a well recognized feature of American law. The federal government is not able to make reasonable determinations regarding local land use matters, and they are properly left to state and local government. Courts have consistently recognized that local government may regulate, restrict and prohibit the use of land for airports and heliports. There is no reasonable basis to distinguish between local authority to regulate the location of landing sites for land based aircraft and the authority to regulate the location of landing sites for seaplanes. Both involve the health, safety and welfare of the local community and both are matters of local regulatory concern.

In *Garden State Farms v Bay*, supra, at 1182, the Court commented on public policy as applying to possible preemption of heliport regulation, as follows:

> . . . as a policy matter, if federal preemption were found in the present case, state and local governments, which are the only bodies that currently license privately operated helistops and heliports, would be shorn of this regulatory responsibility. Congress could not have

> intended to create a governmental vacuum with respect to privately operated helistops. (citing cases) Accordingly, we conclude that federal legislation and regulation have not preempted state and local jurisdiction with respect to the placement of private helistops.

Similarly, only state and local government are in a position to regulate the use of inland lake surfaces by water craft of various types, and the federal government has not undertaken to do so. Zoning and land use matters are properly left to local government, and under *Square Lake*, supra, and *Hess*, supra, zoning and land use regulatory authority includes the right to regulate lake uses in Michigan.

J. The Fatal Defect in Petitioner's Argument is the Failure to Distinguish Between Airspace and Land Use Regulation

Petitioner argues, "The effect of this (Court of Appeals) opinion will be . . . to render seaplane travel in this country a **flight through a minefield** of local regulations (Petition, p 11, emphasis supplied)." This strange mixed metaphor illustrates the fundamental defect in Petitioner's argument.

Minefields are on the surface of the earth, not in the navigable airspace where flight occurs. The FAA is not authorized to eliminate minefields. The FAA is not able to evaluate local land use concerns and does not do so. Local government has the authority and responsibility to protect the public from land uses which endanger the public health, safety and welfare.

The Courts have ruled consistently that state and local government may regulate landing sites and may prohibit the landing of airplanes, seaplanes and helicopters. The Court of Appeals correctly determined that the Lake Angelus ordinances were valid and enforceable and not subject to federal preemption.

Petitioner's argument that the "seaplane industry" is threatened, has no merit. State and local seaplane prohibitions are widespread and long standing, with no apparent effect on the industry. The Lake Angelus ordinances have been in effect for more than twenty years.

V.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

BEIER HOWLETT, P.C.
James L. Howlett
Counsel of Record
John D. Staran
200 East Long Lake Road,
Suite 110
Bloomfield Hills, MI
48304-2361
(810) 645-9400

Dated: July 23, 1996

No. 95-2054

In The Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS;
DONALD ALTHOFF, Mayor of
the City of Lake Angelus;
MICHAEL STEFANI, Chief of Lake
Angelus Police Force,

Respondents.

APPENDIX

BEIER HOWLETT, P.C.
James L. Howlett
Counsel of Record
John D. Staran
200 East Long Lake Road,
Suite 110
Bloomfield Hills, MI
48304-2361
(810) 645-9400

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Appendix A

Resolution of the City Council
of the City of Lake Angelus, September 10, 1991

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LAKE ANGELUS

Whereas, the City Council of the City of Lake Angelus has given consideration to the intended purposes and reasonableness of Section 3 J City Ordinance No. 22, as amended, which declares the following to be a misdemeanor and a public nuisance:

> The landing upon the lands, waters, or ice surface with the City of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft or the flying of any such craft in the airspace above the City of Lake Angelus at an altitude of less than five hundred feet; and

Whereas, the City Council has determined and hereby reaffirms that the intended purpose of the foregoing ordinance is to protect the public health, safety, and general welfare of persons and property within the City of Lake Angelus; and

Whereas, the City Council believes that the use of Lake Angelus in violation of the foregoing ordinance would be contrary to the public health, safety, and welfare because of noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water, destruction of property values, interference with other lawful uses of the lake enjoyed by the great majority of citizens including boating, sailing, fishing, swimming, and other recreational uses; and

Whereas, the unique nature of the community and the value attributed to property located in the City of Lake Angelus are based and depended upon the continuation of longstanding restrictions against uses deemed offensive by the great majority of citizens;

It is therefore resolved that the City Council of the City of Lake Angelus reaffirms that Section 3 J of City Ordinance No. 22, as amended, is reasonable, appropriate, and in the best interest of the public health, safety, and general welfare of persons and property within the City of Lake Angelus.

Adopted by the City of Council of the City of Lake Angelus at its meeting held September 10, 1991.

/s/ FRANCIS C. MCMATH
Francis C. McMath, Mayor

/s/ NANCY DELORGE
Nancy DeLorge, Clerk

1220 H

Appendix B

Excerpt from Deposition of Robert Gustafson, May 21, 1993

Q Is there anything different or in addition to what you told us before that you would now incorporate as part of a seaplane checkout, as opposed to back in 1991?

A Well, subsequent to these original flights and discussions, I have come to know through papers and, of course, through Lake Angelus making reference to it, about the mussel parasite that could be on different surfaces of boats, airplanes, whatever else.

In view of the fact that the floats themselves are absolutely tight and screwed tight with no exhaust pipes or any other kind of openings in them, if a float is up off the water, it could be examined very carefully to see that there are no parasites on; or, in fact, if you wanted to get it off, you could wash them off before you actually leave.

I now know that. And particularly if I was landing at Lake Angelus, I would certainly make sure that that happens.

However, Lake Angelus doesn't have, on their boats, any kind of requirements for washing before their boats go in Lake Angelus. But,

certainly, I would see to it and have an opportunity to see it with the airplane.

MR. CHAIT: Thank you. I have nothing further.

— — —

OAKLAND COURT REPORTERS, INC.
1520 N. Woodward - Suite 50
Bloomfield Hills, Michigan 48013
(313) 645-5035

Appendix C

Excerpts from Transcript of hearing on Motions for Summary Judgment, October 21, 1993

[Transcript p 16] THE COURT: Well, I understand, but that's again — and it seems to me that's a judgement to be made by the village council; that is, the elected representatives.

For instance, regardless of the fact that you may feel that boats are a lot more dangerous than airplanes, and that may very well be, it seems to me that, absent the preemption doctrine, the — the council, the board, whatever the governing body of the municipality is concerned, could adopt a regulation regarding airplanes on the basis that in the event of a malfunction, a boat isn't going to plunge into a neighborhood, you know, and — and cause havoc and burn down houses and all that sort of thing, but a plane certainly can.

[Transcript p 28] MR. CHAIT: Yes, your Honor. That kind of goes, again, hand in hand. Both Mr. Stefani and Mr. Althoff who are the individuals who specifically are in charge with enforcing these and — and enacting these improper regulations or ordinances, are specifically denying Mr. Gustafson the opportunity to — to — to use his constitutionally granted rights to operate a vehicle out there when there's really no rational basis for preventing him from doing it. It really comes down to — and your Honor, if — I think I've touched on this before — but if the Court looks at the — the history of these ordinances, I think they clearly knew all along that they didn't have the ability to do this or the right to do this. It's only very recently that they've even gotten these arguments from the *Square Lake Hills* case and the *Hess* case.

THE COURT: Now leaving out the preemption issue for the moment, it's your contention then that these — that these ordinances are not rationally related to any legitimate state interest?

MR. CHAIT: I absolutely believe that, your Honor. There is absolutely —

THE COURT: Isn't there legitimate state interest in — in — in abating noise? Isn't there legitimate state interest in avoiding — even though the — the danger may be remote — but avoiding the — the possibility of an — of a — a landing or taking off aircraft diving into an inhabited [Transcript p 29] subdivision?

MR. CHAIT: Your Honor, number one, there is no greater risk in my opinion, of the — of what you've just indicated as far as an airplane crashing. Those aircraft are in — that community is within the airport traffic area of Oakland-Pontiac Airport.

THE COURT: That's not an airport.

MR. CHAIT: Well, that's correct. But they — those aircraft are going to be out there, and that's a high density airplane area and there's nothing that anyone — they knew that when they built the —

THE COURT: But I — I don't know a lot about — you know, I don't claim — profess to be an expert regarding aircraft, but don't you suppose that the municipality could rationally adopt the view the — that the greatest danger from aircraft is during the take-off and the landing? I have at least read that, and I don't profess to — to be any sort of an expert regarding aircraft. But I understanding that most accidents involving aircraft, occur during either take-off or landing.

MR. CHAIT: Your Honor, I would state number one, that we would have expert testimony to indicate that seaplane operation is very safe. I —

THE COURT: But isn't that a — isn't that a — isn't that a judgment call?

[Transcript p 30] MR. CHAIT: Well, I think they're going to be unable — they don't have any expert or any studies or anything — it's clear on their — on the — in the records of this case already — they've never made those kind of studies. And without having made those studies, it is an arbitrary — I mean frankly, Mr. Stefani said well, hey, everybody knows that airplanes are dangerous. Well, airplanes — this is the 1990's, you Honor. Back in the twenties, you know, there was bush flying and people — they —

THE COURT: Yeah, but you — you — you compare them with the boats, and I — and I — I've tried to make that distinction. I can find a rational reason why they might not want to have aircraft landing and taking off, because after all, boats aren't going to strike the roof of a house.

MR. CHAIT: Yeah, but these boats are going to crash into each other and cause deaths at a far, far higher rate.

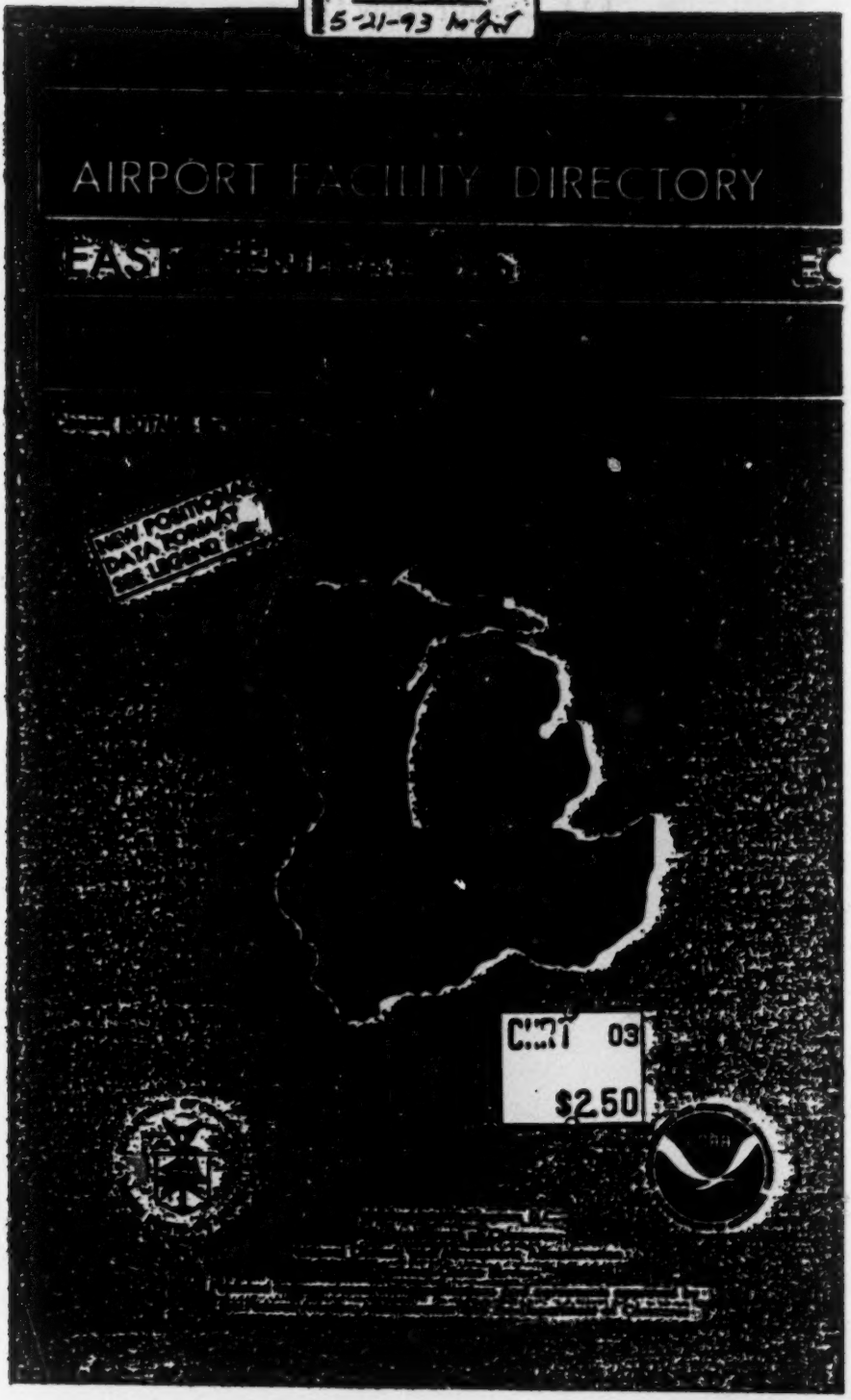
THE COURT: Well — but I think you're just — but I think you're just — you demonstrate by your remarks the fact that — that — that's a disputable point. That's a matter that seems to me is discretionary within the legitimate discretion of the municipality. And similarly with noise. Now you say, well, boats are — are noisier than seaplanes. I suppose that depends on the type of seaplane.

MR. CHAIT: That's correct.

Appendix D

FAA Airport/Facility Directory
Oakland-Pontiac Airport Remarks

DEPOSITION EXHIBIT 2
5-21-93 MGS



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OAKLAND-PONTIAC (PTK) 5 W · UTC-5(-4DT) · N42°39.90' W83°25.08' · [illegible] (23) 220 DETROIT
980 8 S4 FUEL 100LL, JET A OX 1 LRA ARFF Index Ltd. [illegible] B-SS, L-I, 2C, A
RWY 09R-27L: H6200X150 (ASPH-PFC) S-50, D-150, DT-250 HIRL [illegible] IAP
RWY 09R: MALSR. RWY 27L: REIL. VASI(V4L)—GA 3.0°TCH 49'. Trees.
RWY 09L-27R: H3251X75 (ASPH) S-12.5 MIRL [illegible]
RWY 09L: REIL. VASI(V2L)—GA 3.0°TCH 29'. [illegible] RWY 27R: REIL. VASI(V2L)—GA 3.0°TCH 29'.
RWY 04-22: H2451X75 (ASPH) S-12.5 [illegible]
RWY 04: VASI(V2L)—GA 3.75°TCH 37'. Road. — RWY 22: VASI(V2L)—GA 3.75°TCH 48'. Trees.
RWY 18-36: H1856X50 (ASPH) S-12.5 [illegible]
RWY 18: Trees. RWY 36: Hedge.

AIRPORT REMARKS: Attended continuously. Landing fee for acft over 7500 lbs. Arpt CLOSED to air carrier ops with more than 30 passenger seats except PPR call arpt manager 313-666-3900. Birds and deer on and in vicinity of arpt. Seaplane ldgs and takeoffs on Lake Angelus 4.5 miles ENE is prohibited by local ordinance. When twr clsd, HIRL Rwy 09R-27L preset on medium inst, to increase inst Rwy 09R-27L or turn on MIRL Rwy 09L-27R radio req on unicom. ACTIVATE MALSR Rwy 09R—CTAF. Control twr unable to see more than 200' S of Rwy 36 thld. US Customs user fee arpt. For customs clearance 8 hours minimum advance notification required. Pilots must ctc US Customs on 313-226-3140; request for customs svc by FAA flight plan is not accepted. Control Zone effective 1100-0500Z‡. [illegible]
WEATHER DATA SOURCE: LAWRE[illegible]
COMMUNICATIONS: CTAF 120.5 ATIS 125.45 313-666-3621 (1100-0500Z‡) UNICOM 122.95
LANSING FSS (LAN) TF 1-800-WX-BRIEF. NOTAM FILE PTK
PONTIAC RCO 122.15R 111.0T (LANSING FSS)
Ⓓ DETROIT APP/DEP CON 124.9 [illegible]
PONTIAC TOWER 120.5 123.7 (1100-0500Z‡) GND CON 121.9 CLNC DEL 118.25 [illegible]
RADIO AIDS TO NAVIGATION: NOTAM FILE PTK [illegible]
PONTIAC (L) VORTAC 111.0 PSI Chan 47 N42°42.02' W83°31.96' 116°5.5 NM to fld. 1150/3W. ILS 111.1 I-PTK Rwy 09R. Unmonitored when twr clsd. [illegible]

FILE COPY

Appendix E

Wisconsin Statutes @ 30.78

PUBLIC DOMAIN AND THE TRUST FUNDS
CHAPTER 30. NAVIGABLE WATERS, HARBORS AND NAVIGATION
SUBCHAPTER V. REGULATION OF BOATING

Wis. Stat. @ 30.78 (1994)

30.78 Local regulation of seaplanes

(1) City, village and town ordinances. Any city, village or town adjoining or surrounding any waters may, after public hearing, by ordinance:

(a) Prescribe reasonable safety regulations relating to the operation on the surface of such waters of any aircraft capable of landing on water.

(b) Prescribe the areas which may be used as a landing and take-off strip for the aircraft or prohibit the use of the waters altogether.

(c) Provide proper and reasonable penalties for the violation of any such ordinance.

(1g)(a) A public inland lake protection and rehabilitation district, after public hearing, may enact and enforce local ordinances applicable to a lake entirely within its boundaries if each town, village and city having jurisdiction on the lake adopts a resolution authorizing the lake district to do so.

(b) Ordinances authorized under par. (a) are limited to the type of ordinances authorized under sub. (1) (a) to (c).

Appendix F

Vermont Statutes 5 V.S.A. @ 403

TITLE 5 AERONAUTICS AND SURFACE TRANSPORTATION GENERALLY
PART 2. AERONAUTICS
CHAPTER 13. OPERATION OF AIRCRAFT
SUBCHAPTER 1. GENERAL PROVISIONS

5 V.S.A. @ 403 (1995)

403. Lawful and unlawful flight; landing

Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owner, or unless conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without consent, or where there has been no airport, heliport, restricted landing area or seaport established in accordance with the provisions of this title, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the airman shall be liable, as provided in section 479 of this title.

Appendix G

Pennsylvania Statutes 67 Pa. Code @ 471.5

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

SUBPART B. NON-VEHICLE CODE PROVISIONS

ARTICLE IV. AIR TRANSPORTATION

CHAPTER 471. AIRPORT RATING AND LICENSING

67 Pa. Code @ 471.5 (1995)

@ 471.5. Airport rating — excluding heliports.

(a) The following represents rating categories to be used by the Bureau for issuance of an airport license:

(1) Public airport.

(i) Scheduled service. An airport with a paved runway, a runway lighting system, a precision instrument landing system and passenger handling facilities.

(ii) Business. An airport with a paved runway 3,500 feet or greater, a runway lighting system and a precision or nonprecision instrument landing approach.

(iii) General service. An airport with a turf or paved runway with or without an instrument approach.

(iv) Ultralight. A landing area for the use of ultralight aircraft.

(v) Seaplane base. An area of water used as a landing area.

(2) Private airport.

(i) Individual. A private airport used exclusively by the licensee.

(ii) Group. A private airport used exclusively by a partnership, organization or corporation which is restricted to members of that entity.

(iii) Commercial. A private airport from which the licensee can conduct commercial flight operations, excluding flight instruction but including commercial operations such as maintenance, sale of aircraft or parts.

(iv) Ultralight. A landing area for the use of ultralight aircraft.

(v) Seaplane. An area of water used as a landing area.

(b) Use of landing area by another aircraft. A private airport licensee may invite another aircraft to use his landing area if the licensee has thoroughly briefed the invitee as to the peculiarities of the landing area. The invitee's aircraft operational requirements may not exceed the dimensions of the landing area.

Appendix H

Iowa Code @ 462A.30

TITLE XI NATURAL RESOURCES
SUBTITLE 2 LANDS AND WATERS
CHAPTER 462A WATER NAVIGATION REGULATIONS

Iowa Code @ 462A.30 (1995)

462A.30 Aircraft restriction

It is unlawful for any aircraft to make use of the inland lakes of the state, except in the transportation of persons or property between points separated by a distance of thirty miles or more. However, this section does not prohibit the use of such waters by any aircraft in danger or distress or the use of such waters by the operators of private aircraft, not operated for hire. In addition, the commission may, on the recommendation of the state department of transportation, designate certain areas on inland lakes of the state where seaplane flight instruction may be conducted under such conditions as may be adopted by the commission and the state department of transportation.

Appendix I

New Hampshire Statutes, RSA 422.34 VIII

TITLE XXXIX. AERONAUTICS
CHAPTER 422. NEW HAMPSHIRE AERONAUTICS ACT
PROHIBITIONS AND PENALTIES

RSA 422:34 (1995)

422:34. Prohibitions

It shall be unlawful:

* * *

VIII. For any person to operate or authorize the operation of aircraft for compensation or hire from any of the public inland waters or ice areas of the state unless such area is registered with the department. Applications for such registration shall contain such details with respect to the areas from which flights are to be made as the department may from time to time require.

* * *

Appendix J

Connecticut Statutes, CT ST s 25-43

CONNECTICUT GENERAL STATUTES ANNOTATED
TITLE 25. WATER RESOURCES.
FLOOD AND EROSION CONTROL
CHAPTER 474. POLLUTION
PART III. WATER AND ICE SUPPLIES
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Current through End of 1993 Oct.Sp.Sess.

s 25-43. Bathing in and pollution of reservoirs. Aircraft on reservoirs

(a) Any person who bathes or swims in any reservoir from which the inhabitants of any town, city or borough are supplied with water, or in any lake, pond or stream tributary to any distribution reservoir, or in any part of any lake, pond or stream tributary to any storage reservoir, which part is distant less than two miles measured along the flow of water from any part of such storage reservoir, and any person who casts any filthy or impure substance into any such reservoir, whether distribution or storage, or any of its tributaries, or commits any nuisance in or about it or them, shall be fined not more than one hundred dollars or imprisoned not more than six months, or both. For the purposes of this section, a storage reservoir is defined as an artificial impoundment of substantial amounts of water, used or designated for the storage of a public water supply and the release thereof to a distribution reservoir, defined for the purposes of this section as a reservoir from which water is directly released into pipes or pipelines leading to treatment or purification facilities or connected directly with distribution mains of a public water system.

(b) No person, after notice has been posted that any reservoir, lake or pond, or any stream tributary thereto, is used for supplying the inhabitants of a town, city or borough with water, shall wash any animal or clothing or other article therein. No person shall throw any noxious or harmful substance into such reservoir, lake, pond or stream, nor shall any person, after receipt of written notice from the director of health having jurisdiction that the same is detrimental to such water supply, permit any such substance to be placed upon land owned, occupied or controlled by him, so that the same may be carried by rains or freshets into

the water of such reservoir, lake, pond or stream, or allow to be drained any sewage from such land into such water. Any person who violates any provision of this subsection shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

(c) No person shall cause or permit an aircraft, as defined in subdivision (5) of section 15-34, to land upon, take off from or be operated, kept, parked, garaged, stored or otherwise maintained on any distribution or storage reservoir on any watercourse tributary to any such reservoir.

Appendix K

Michigan Statutes, M.C.L.A. 117.3 (j) and (k)

117.3. Mandatory Charter Provisions

Sec. 3. Each city charter shall provide the following:

* * *

(j) **Public peace, health and safety.** For the public peace and health and for the safety of persons and property. In providing for the public peace, health, and safety, a city may expend funds or enter into contracts with a private organization, the federal or state government, a county, village, township, or another city for services considered necessary by the municipal body vested with legislative power. Public peace, health, and safety services may included the operation of child guidance and community mental health clinics, the prevention, counseling, and treatment of developmental disabilities, the prevention of drug abuse, and the counseling and treatment of drug abusers.

(k) **Ordinances, adoption of codes, publication, procedure, inspection.** For adopting, continuing, amending, and repealing the city ordinances and for the publication of each ordinance before it becomes operative. Whether or not provided in its charter, a city may adopt a law, code, or rules which have been promulgated and adopted by an authorized agency of the state pertaining to fire, fire hazards, fire prevention, or fire waste, and a fire prevention code, plumbing code, heating code, electrical code, building code, refrigeration machinery code, piping code, boiler code, boiler operation code, elevator machinery code, or a code pertaining to flammable liquids and gases, as well as to hazardous chemicals, which have been promulgated by this state, or by a department, board, or other agency of this state, or by an organization or association which is organized and conducted for the purpose of developing the code, by reference to the code in an adopting ordinance and without publishing the code in full. The code shall be clearly identified in the ordinance and its purpose shall be published with the adopting ordinance. Printed copies of the code shall be kept in the office of the city clerk, available for inspection by, and distribution to, the public at all times. The publication shall contain a notice stating that a

complete copy of the code is made available to the public at the office of the city clerk in compliance with state law requiring that records of public bodies be made available to the general public.

* * *

Appendix L

Michigan Statutes, M.C.L.A. 125.581, Section (1)

125.581. Regulation and restriction of use of land and structures

Sec. 1. (1) The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations.